No. 95-953

(6)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

v.

CITY OF NEW YORK, RALPH A. BALZANO, COMMISSIONER OF DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, AND JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN

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STATEMENT PURSUANT TO RULE 29.6

Time Warner Cable of New York City is a division of Time Warner Cable, an unincorporated division of Time Warner Entertainment Company, L.P. ("Time Warner Entertainment"). Each of the following general partners of Time Warner Entertainment is a wholly owned subsidiary of Time Warner Inc., a publicly traded Delaware corporation:

American Television and Communications Corporation
Time Warner Operations Inc.
Warner Cable Communications Inc.
Warner Communications Inc.

The limited partners of Time Warner Entertainment are:

U S West Multimedia Communications, Inc., a subsidiary of U S West, Inc.
Time Warner Inc.
TW/TAE, Inc., a wholly-owned subsidiary of Time Warner Inc.

The following are non-wholly owned subsidiaries of Time Warner Entertainment:

The Bountiful Company Limited (U.K.)
Century Venture Corporation
Comedy Partners, L.P.
CV of Viera Joint Venture (partnership)
Dagmar Teatret I/S (Denmark) (partnership)
DC Comics (partnership)
Erie Telecommunications, Inc.
Geffen Pictures (partnership)
HBO Asia Holdings, L.P. (partnership)
HBO Pacific Partners, C.V. (Neth. Antiles)
Kabelkom Holding Co. (partnership)
Kabelkom Management Co. (partnership)
Kansas City Cable Partners
Movie World Enterprises Partnership (Australia)
Queens Inner Unity Cable System

Quincy Jones Entertainment Company L.P. (partnership)
Sari Lodge Pty. Limited (Australia)
Scala Biografome I/S (Denmark) (partnership)
Sea World Enterprises Partnership (Australia)
Time Warner Cable of New Zealand Holdings Ltd. (New Zealand)
Time Warner Entertainment German GmbH and Co. OHG (Germany)
Time Warner Germany Holding GmbH (Germany)
Turner/HBO Ltd. Purpose Joint Venture (partnership)
Warner Bros. Movie World GmbH & Co. KG (Germany)
Warner-Lusomundo Sociedade Iberica de Cinemas Lda. (Portugal)
Warner & Metronome Films A/S (Denmark)
Warner Mycal Corporation (Japan)

The following are non-wholly owned subsidiaries of the general partners of Time Warner Entertainment:

American Lawyer Media, L.P. (partnership)
The Columbia House Company (partnership)
The Columbia House Company (Canada) (partnership)
Public Cable Company (partnership)

Paragon Cable Manhattan is a division of Paragon Communications, a Colorado general partnership. All of the partners in Paragon Communications are indirectly owned by Time Warner Inc.

TABLE OF AUTHORITIES

Cases	Page(s)
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Telecommunications Act of 1996, Public Law 104-104	1, 3, 4

INTRODUCTION

Respondents Time Warner Cable of New York City ("TWCNYC") and Paragon Cable Manhattan ("Paragon") submit this brief in opposition to the petition for writ of *certiorari* filed by Liberty Cable Company, Inc. ("Liberty"). Further review of this case would be inappropriate because the case has been mooted by passage of the Telecommunications Act of 1996, Public Law 104-104, which was signed into law on February 8, 1996 and took effect upon enactment.

STATEMENT OF THE CASE

Under both federal and New York law, cable systems are required to obtain franchises from local franchising authorities before commencing operations. Until last week, federal law provided that the term "cable system" "does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way". 47 U.S.C. § 522(7)(B) (1995). In 1993, this Court rejected a constitutional challenge (on equal protection grounds) to the federal definition of "cable system", reversing the Court of Appeals for the D.C. Circuit and holding that the government's ability to regulate cable systems does not turn on the use of public rights-of-way. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). The Court remanded the case to the Court of Appeals for consideration of the First Amendment claims, which the Court of Appeals dismissed as meritless. *Beach Communications, Inc. v. FCC*, 10 F.3d 811 (D.C. Cir. 1993).

In 1994, Liberty was caught operating an illegal cable system like those involved in the *Beach* case, *i.e.*, Liberty was interconnecting by wire buildings that were not under common ownership, control or management, even though it had not applied for—much less obtained—a cable franchise as required by federal and state law. Liberty's

interconnections allegedly do not use public rights-of-way. Liberty, once caught, repeatedly asked the New York State Commission on Cable Television ("Commission") to delay its enforcement proceedings for at least six months, so that Liberty would have time to ask the City of New York for a cable franchise; in return, Liberty voluntarily promised that it would not expand its illegal operations while waiting for its franchise application to be processed.

Instead of deferring its proceedings as Liberty had requested, the Commission issued a "standstill order" that prohibited Liberty from connecting new buildings in violation of federal and state law, but permitted Liberty to continue its existing illegal operations until the Commission took final action, which is precisely what Liberty had volunteered to do. Later, the Commission deferred taking final action until the City had acted upon Liberty's request for a franchise.

The Commission's order did not prohibit Liberty from engaging in speech. Indeed, Liberty, which advertises itself as a SMATV (satellite master antenna television) operator, principally provides video programming to subscribers by the use of microwave transmission to rooftop antennae. That mode of operation, because it did not fall within the definition of "cable system", was not regulated and was in no way affected by the standstill order. Liberty remained free to place microwave receivers and transmitters on appropriate buildings and deliver speech in that manner instead of running wires between non-commonly owned buildings. In fact, many of the buildings illegally served by Liberty were ones for which Liberty had sought and obtained FCC 18GHz microwave licenses authorizing the installation of transmission and/or reception dishes.

Although Liberty could have raised its constitutional claims before the Commission, and could have appealed the Commission's decision through the New York state courts, it chose not to do so. Instead, Liberty filed this action in the

United States District Court for the Southern District of New York, challenging the federal—but not the New York (*see* N.Y. Exec. Law Art. 28 § 812(2))—definition of "cable system" (contained in 47 U.S.C. § 522(7)) on First Amendment, due process and equal protection grounds.

Notably, Liberty did not challenge as unconstitutional any of the substantive requirements imposed by federal or state law upon cable systems (*e.g.*, the "must-carry" requirements, the public, educational and governmental channel requirements, the civil defense system requirements). Instead, Liberty's challenge was purely to the definition of "cable system" contained in 47 U.S.C. § 522(7); Liberty's argument was that because Liberty did not use public rights-of-way, it could not be regulated by the federal or state governments. The district court denied Liberty's application for a preliminary injunction, finding that Liberty was not likely to succeed on the merits. In particular, the district court held that Liberty's equal protection claims were meritless in light of this Court's decision in *Beach*, that Liberty's due process and First Amendment claims were unripe because Liberty had not chosen to challenge any of the mandatory obligations placed on cable operators by federal or state law, and that the burdens that might be imposed by a franchise were too amorphous to permit challenge to the federal definition of "cable system" at that time. The Court of Appeals affirmed.

ARGUMENT

The petition for *certiorari* is now moot. On February 8, 1996, the Telecommunications Act of 1996, Public Law 104-104, was enacted into law, effective immediately. The Act amended the definition of "cable system" so that the interconnection of buildings under disparate ownership, control or management without using public rights of way no longer falls within the definition of "cable system". The Act amended § 522(7) so that "a facility that serves subscribers without using any public right-of-way" is now excluded from

the definition of "cable system", even if that facility interconnects separately owned or operated buildings. Public Law 104-104, Sec. 301(a)(2). Thus, Liberty's formerly illegal cable systems are no longer defined as cable systems under federal law. Consequently, this action—which is a challenge to the repealed definition contained in § 522(7)—is now moot. *See, e.g., Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989).

In telephone conversations following Congress's passage of the Act, Mr. Constantine, counsel for Liberty, agreed that passage of the Act would moot the petition for *certiorari* if the PUC[1] decided that it would not impose fines or forfeitures based upon Liberty's violations of the repealed law. However, Mr. Constantine stated that he would pursue his petition unless the PUC informed him that it had abandoned any claim for penalties or forfeitures.

Even were the PUC ultimately to impose penalties or forfeitures, however, this Court should nevertheless deny the petition for *certiorari*. The mere possibility that, at some future time, the PUC might impose penalties or forfeitures does not transform this case into one ripe for adjudication, much less worthy of review by *certiorari*. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). If the PUC levies penalties or forfeitures, Liberty can obtain full review of that decision through the New York state courts and may apply to this Court for review if it chooses. Moreover, whether the state of New York may assess a civil penalty on Liberty for wilfully and blatantly violating a law that has since been effectively repealed is hardly an issue worthy of review by *certiorari*.

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[1] Effective January 1, 1996, the Commission was dissolved by state law, and its functions were transferred to the Public Utilities Commission of New York State ("PUC").

Congress repealed the very provision on which Liberty's claim was based and replaced it with one that excludes Liberty's interconnection of buildings under disparate ownership, control or management from the definition of "cable system". Thus, there is nothing left of Liberty's lawsuit, and no reason whatsoever to grant *certiorari*.

CONCLUSION

For the reasons stated herein, respondents TWCNYC and Paragon respectfully suggest that the petition for *certiorari* be dismissed as moot or denied.

February 16, 1996

Respectfully submitted,

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